UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WMC MORTGAGE CORP.,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 09-10437-NMG
MASSACHUSETTS PROPERTY INSURANCE UNDERWRITING ASSOCIATION,	)	
	)	
Defendant.	)	

ORDER

Having considered the objections of both parties to the Report and Recommendation and, because the Magistrate Judge's determination that 1) the plaintiff is entitled to summary judgment on Count I, 2) the defendant is entitled to summary judgment on Counts II and III and 3) the defendant is entitled to its costs and attorney's fees is sound and well reasoned, the Report and Recommendation (Docket No. 30) is accepted and adopted.

So Ordered.

/ s / Nathaniel M. Gorton
Nathaniel M. Gordon
United States DistrictJudge

DATED: September 22, 2010

REPORT AND RECOMMENDATION ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

September 1, 2010

DEIN, U.S.M.J.

I. INTRODUCTION

The plaintiff, WMC Mortgage Corp. ("WMC"), is the holder of a note secured by a mortgage on real property located at 1128 Main Street in Athol, Massachusetts (the "Property"). In 2006, the defendant, Massachusetts Property Insurance Underwriting Association ("MPIUA"), issued a homeowners insurance policy (the "Policy") for the Property, which provided insurance coverage to both the homeowner and the mortgagee for certain losses at the Property. By this action, WMC claims that MPIUA breached its contractual obligations under the terms of the Policy (Count I), breached the covenant of good faith and fair dealing implied in the Policy (Count II), and engaged in unfair settlement practices (Count III) by refusing to pay WMC or its predecessor mortgagee for losses they sustained as a result of fire and water damage at the Property. MPIUA denies that it is liable, and contends that it has been relieved of any obligation to provide mortgagee coverage under the Policy. Specifically, MPIUA asserts that as a result of WMC's and its predecessor's failure to submit "satisfactory proof" of their "rights and title" to the Mortgage, the defendant was excused from any obligation to pay insurance proceeds pursuant to Mass. Gen. Laws ch. 175, § 97. Furthermore, MPIUA contends that the failure of the plaintiff and its predecessor to comply with the insurer's requests for documentation establishing their mortgagee status constituted a breach of their duty to

cooperate with MPIUA's investigation of the mortgagee claims and foreclosed any right to coverage.

Presently before the court are "MPIUA's Motion for Summary Judgment" (Docket No. 13) and WMC's "Cross Motion for Summary Judgment" (Docket No. 22), by which the parties are seeking summary judgment on all of WMC's claims. As described herein, this court finds that MPIUA's denial of coverage prior to the initiation of this action was appropriate in light of the failure of WMC and its predecessor to produce evidence showing that they were proper claimants under the Policy. Therefore, MPIUA did not fail to act in good faith or engage in unfair settlement practices in denying the mortgagee claims under the Policy. However, since this lawsuit was filed, WMC has produced evidence showing that it is the current mortgagee with respect to the Property and that it is a proper claimant under the Policy. Because this court finds that any prejudice MPIUA has suffered due to the plaintiff's delay in furnishing this information can be remedied by an order requiring the plaintiff to pay all costs and attorneys' fees that MPIUA has incurred in connection with this action, this court concludes that WMC should not be required to forfeit coverage under the Policy. Therefore, and for all the reasons detailed below, this court recommends to the District Judge to whom this case is assigned that both parties' motions for summary judgment be ALLOWED IN PART and DENIED IN PART. Specifically, this court recommends that MPIUA's motion for summary judgment be allowed with respect to WMC's claims for breach of the implied covenant of good faith and fair dealing and for unfair settlement practices (Counts II and III), but otherwise

denied. This court further recommends that WMC's cross-motion for summary judgment be allowed with respect to the breach of contract claim (Count I), subject to an order that WMC pay MPIUA for all costs and attorneys' fees incurred in connection with this litigation, and that WMC's motion otherwise be denied.

II. STATEMENT OF FACTS[1]

The following facts are undisputed unless otherwise indicated.

On October 5, 2006, John A. Brohl ("Brohl"), the owner of the Property, executed an Adjustable Rate Note ("Note"), in the amount of $152,000, in favor of WMC. (PF ¶ 1; DR ¶ 1). The Note was secured by a mortgage ("Mortgage") on the Property that identified WMC as the "Lender" and Mortgage Electronic Registration Systems, Inc. ("MERS")[2] as the "mortgagee" "acting solely as a nominee for Lender and Lender's

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[1] The facts are derived from: (1) MPIUA's Rule 56.1 Statement of Undisputed Facts in Support of its Motion for Summary Judgment (Docket No. 15) ("DF") and the exhibits attached thereto ("Def. Ex. __"); (2) WMC's Response to MPIUA's Statement of Undisputed Facts, which is set forth in Docket No. 24 ("PR"); (3) WMC's Statement of Material Facts in Support of its Opposition to MPIUA's Motion for Summary Judgment and its Cross Motion for Summary Judgment, which is set forth in Docket No. 24 ("PF"); (4) the Affidavit of William F. Loch (Docket No. 25) ("Loch Aff."); (5) the documents attached to the Affidavit of Amy B. Hackett (Docket No. 26) ("Pl. Ex. __"); and (6) MPIUA's Response to WMC's Statement of Material Facts (Docket No. 29) ("DR").

[2] "[T]he MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system. The initial MERS mortgage is recorded in the County Clerk's office with 'Mortgage Electronic Registration Systems, Inc.' named as the lender's nominee or mortgagee of record on the instrument. During

successors and assigns." (Loch Aff., Ex. 2 at 1). On October 6, 2006, WMC, as "Lender," filed the Mortgage in the Worcester District Registry of Deeds. (DF ¶ 2).[3]

MPIUA's Issuance of the Policy

Also in October 2006, MPIUA issued Brohl the homeowners Policy which is at issue in this case. (DF ¶ 1). The Policy contains a "Mortgage Clause," which provides in relevant part as follows:

> If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.
>
> If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:
>
> a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

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the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS's private system. In the MERS system, the mortgagor is notified of transfers of servicing rights pursuant to the Truth in Lending Act, but not necessarily of assignments of the beneficial interest in the mortgage." MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 96, 828 N.Y.S.2d 266, 268, 861, N.E.2d 81, 83 (2006) (footnotes omitted).

[3] The record indicates that WMC made a second loan to Brohl, in the amount of $38,000, which was secured by a second mortgage on the Property, which was filed in the Worcester District Register of Deeds. (See DF ¶ 2; Def. Ex. B at 2). According to WMC, that loan is not relevant to its claims in this case. (See Pl. Mem. (Docket No. 23) at 2 n.2). Therefore, this court has not described any facts pertaining to the second mortgage.

> b. pays any premium due under this policy on demand if you have neglected to pay the premium; and
>
> c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

(PF ¶ 2; DF ¶ 5). The Policy named "WMC Mortgage Corp. c/o Litton Loan Servicing, LLP, ISAOA/ATIMA, PO Box 4354, Houston, TX 77210-4354" as the original mortgagee with respect to the Property. (DF ¶ 3; PF ¶ 2).

Among the "Conditions" included in the Policy is a provision entitled "Your Duties After Loss." (Def. Ex. A at Agreement p. 6). It provides in relevant part:

> In case of a loss to covered property, you must see that the following are done ...
>
> d. as often as we reasonably require:
>
> (1) show the damaged property;
>
> (2) provide us with records and documents we request and permit us to make copies; and
>
> (3) submit to examination under oath, while not in the presence of any other named insured, and sign the same;

(Id. (emphasis added)).

On or about November 29, 2006, WMC transferred the Note to UBS Real Estate Securities, Inc. ("UBS"). (See PF ¶ 3; DR ¶ 3; Loch Aff. ¶ 3). UBS retained Ocwen Loan Servicing LLC ("Ocwen") to service the loan. (Id.). Subsequently, the Policy was

amended, effective January 3, 2007, to add Ocwen as a mortgagee. (PF ¶ 4).[4] Thereafter, no further amendments were made with respect to the mortgagee. (DF ¶ 4). Accordingly, both WMC and Ocwen have remained named as mortgagees under the Policy. (PF ¶ 4).

Losses Sustained at the Property

On January 25, 2007, Brohl notified MPIUA that the Property had sustained water damage, and MPIUA appointed Counter Adjusting Company ("Counter") as the adjuster for the claim. (PF ¶ 5). Counter visited the Property, and also hired Industrial Services & Engineering, Inc. ("ISE") to perform an investigation of the Property. (PF ¶ 6). Based on its investigation, ISE concluded that the water damage was caused by the bursting of a frozen pipe, which occurred due to lack of heat. (Id.). Counter also conducted an appraisal at the Property, and estimated that the cost to repair the damage would be $23,516.50. (PF ¶ 7).

A short time later, on February 4, 2007, a fire broke out at the Property. (PF ¶ 8). Brohl notified MPIUA of the fire on February 5, 2007. (Id.). The Fire Marshall conducted an investigation and concluded that the fire had been caused by an electrical short in the armored cabling above the electrical panel in the building at the Property.

[4] As described below, the Mortgage (as opposed to the Note) was not assigned to UBS until April 3, 2007, three months after Ocwen was named as a mortgagee on the Policy. Nevertheless, it is undisputed that Ocwen was properly named on the Policy, and that it was entitled to pursue a claim for mortgagee coverage under the terms of the Policy.

(Id.). Counter conducted an appraisal, and estimated that the cost to repair the Property would be $57,997.16. (PF ¶ 9). MPIUA ultimately denied Brohl's claims for insurance coverage under the Policy based on the failure to use reasonable care to heat the premises, vacancy and the fact that false statements were made to the insurer during the course of its investigation. (DF ¶ 21). The defendant's denial of Brohl's coverage claim is not at issue in this case.

Assignment of Mortgage to UBS

On April 3, 2007, MERS, "as nominee for WMC MORTGAGE CORP., its successors and assigns," assigned the Mortgage securing the $152,000 loan on the Property to UBS. (See DF ¶ 8; PR ¶ 8; Def. Ex. C; see also note 4 supra). The mortgage assignment to UBS was filed in the Worcester District Registry of Deeds on May 7, 2007. (DF ¶ 11; PR 11). Additionally, on about April 17, 2007, a notice was filed in the Massachusetts Land Court, which was directed to Brohl and provided in relevant part as follows:

> UBS Warburg Real Estate Securities Inc. ... claiming to be the holder of Mortgage covering real property in Athol, numbered 1128 Main Street, given by John A. Brohl to [MERS], acting solely as nominee for WMC Mortgage Corp., dated October 5, 2006, recorded at Worcester County (Worcester District) Registry of Deeds in Book 39922, Page 332 [i.e., securing the $152,000 loan], and now held by the Plaintiff by assignment, has filed with said court a complaint for authority to foreclose said mortgage ....

(Def. Ex. D at 1; see also DF ¶ 9).

On June 8, 2007, MPIUA issued a check in the amount of $35,103.72, made

payable to "Popkin Adjustment Co" as well as to "Ocwen Loan Servicing LLC" and "WMC Mortgage Corp.," the two mortgagees listed on the Policy. (PF ¶ 11; Pl. Exs. 18-19). Records relating to the check indicate that it was issued in response to Brohl's claim for coverage relating to the fire loss. (See Pl. Exs. 18-19). However, as of that date, WMC no longer held the Mortgage. According to WMC, the circumstances surrounding the issuance of the check remain unknown at this time, and it is unclear why the check was issued or whether it was ever sent. (Pl. Mem. at 4 n.6).

Ocwen's Claim for Mortgagee Coverage Under the Policy

On June 12, 2007, counsel for Ocwen, Shannon Maki, sent MPIUA a Notice of Claim in which she stated that her client was seeking damages under the Policy. (Def. Ex. A at Exhibit B). Therein, Attorney Maki described Ocwen as "the mortgagee" with respect to the Property. (Id.). As detailed above, Ocwen was listed on the Policy as a mortgagee at this time, and UBS/Ocwen did, in fact, hold the Mortgage.

In a response to the Notice of Claim, on August 10, 2007, counsel for MPIUA, Paul Weinberg, acknowledged the mortgagee's interest under the Policy and stated that "[t]he mortgagee also has a duty to cooperate in the investigation and adjustment of the loss(es)." (Def. Ex. E). Attorney Weinberg further requested that Ocwen provide MPIUA with its file on the insured Property, including certain specified documents relating to the insured, but raised no questions about Ocwen's status as mortgagee. (Id.). Attorney Maki responded to the request in an August 15, 2007 e-mail to Attorney Weinberg. (Def. Ex. F). Specifically, Attorney Maki informed MPIUA's counsel that

she had requested the information from her client and would forward it "as soon as I receive it from Ocwen." (Def. Ex. F). There is no evidence that Ocwen or its counsel ever provided MPIUA with the requested information. Furthermore, as detailed below, the record shows that the Note had been sold and the servicing rights transferred from Ocwen to another entity before Attorney Weinberg had even responded to Ocwen's Notice of Claim.

SPS' Claim for Mortgagee Coverage Under the Policy

On July 16, 2007, about a month after Ocwen's counsel notified MPIUA of her client's claim under the Policy, WMC repurchased the Note from UBS, and retained Litton Loan Servicing LP ("Litton") to service the loan on its behalf. (PF ¶ 13).[5] Approximately five months later, on about December 20, 2007, WMC resold the loan to Credit Suisse First Boston ("Credit Suisse"). (PF ¶ 14). Select Portfolio Servicing, Inc. ("SPS") became the servicing agent for the loan on behalf of Credit Suisse. (Id.).

By letter to MPIUA's counsel dated June 19, 2008, Pamela Bensimon, a Claims Manager at the Law Offices of Thomas W. Rutledge, submitted a claim to MPIUA on behalf of SPS "as the insured mortgagee under the [P]olicy." (Def. Ex. H at 2). Ms. Bensimon enclosed a number of documents with the letter, including: (1) a copy of the Note; (2) the Policy Declarations; (3) a notice to Brohl dated January 16, 2008 stating that rights to service the loan were transferred from Litton to SPS effective January 25,

[5] At this time, WMC was still listed as a mortgagee on the Policy.

2008; (4) a Validation of Debt Notice from SPS to Brohl dated January 31, 2008; (5) a letter from SPS authorizing the Rutledge firm to handle its property damage claims; (6) an inspection report summary completed by Fidelity Field Services for SPS; (7) a Competitive Market Analysis for the Property; and (8) an Appraisal Report for the Property. (PF ¶ 16; DR ¶ 16; Def. Ex. H). Significantly, the Validation of Debt Notice provided, among other things, that "[a]s the servicer for your mortgage loan, SPS is collecting the debt on behalf of Credit Suisse, the investor who currently owns your mortgage loan." (DF ¶ 20; Def. Ex. H at Validation of Debt Notice).

MPIUA's counsel responded to SPS' claim in a letter dated July 25, 2008. (DF ¶ 22). The letter reads in relevant part as follows:

> We have received and reviewed the information you sent on the subject of SPS Inc.'s claim. As we discussed on Monday, July 31, MPIUA will need more information to consider the SPS claim.
>
> Our client's records identify the mortgagee as WMC Mortgage Corp. c/o Litton Loan Servicing, which issued the two original notes and mortgages (in the amounts of $152,000 and $38,000) to John Brohl. This is reflected on the original declaration page of the MPIUA policy on the 1128 Main Street property. By written request from Litton, the declarations page was later amended to reflect as mortgagee Ocwen Loan Servicing LLC. There is no record of your client as mortgagee, nor of Credit Suisse, the apparent owner of the loan, as mentioned in the correspondence you sent.
>
> Please supply documentation evidencing SPS' or Credit Suisse's status as proper claimants on behalf of the mortgagee, or as mortgagee. Given the circumstances, we'll need to see the paper trail from WMC/Litton to your client. Please also send any documentation that your client notified

> MPIUA of its mortgagee status, or any efforts to amend the declarations page of the policy at issue.

(DF ¶ 22).

It is undisputed that on July 25, 2008, neither SPS nor Credit Suisse was listed as a mortgagee on the Policy, and that MPIUA had no record, and had received no notice, regarding SPS' or Credit Suisse's status as the mortgagee on the Property. (See DF ¶¶ 23-24; PR ¶ 23). Moreover, it is undisputed that at that time, the available public filings continued to reflect the assignment of the Mortgage to UBS, and to show UBS as the mortgagee and Ocwen as the loan servicing agent with respect to the Property. (DF ¶¶ 25, 27-29; PR ¶ 25). Neither SPS nor Credit Suisse was mentioned in the public record, as reflected in filings with the Registry of Deeds regarding the Property. (DF ¶ 30).

On behalf of SPS, Charles Atlas, an attorney at the Law Offices of Thomas W. Rutledge, responded to MPIUA's request for information on September 17, 2008. (DF ¶ 31). In his letter, Attorney Atlas acknowledged the request for "documentation evidencing [SPS'] status as the proper claimant as the insured mortgagee[,]" described the history of servicing agents for the Brohl loan, and represented that SPS "is the successor in interest to Ocwen as the insured mortgagee under the policy." (DF ¶ 32; Def. Ex. K). Attorney Atlas did acknowledge, however, that "[w]e are unaware of any notices sent by any of these entities to notify MPIUA of these changes." (Def. Ex. K). Additionally, Attorney Atlas enclosed copies of notices to Brohl regarding changes in servicing agents, as well as a redacted copy of Brohl's application for the $152,000 loan, the Mortgage, a

title insurance policy, and an appraisal report for the Property. (Def. Ex. K).

On or about September 29, 2008, WMC repurchased the loan from Credit Suisse. (PF ¶ 21). Shortly thereafter, Litton again became the servicing agent for the loan on behalf of WMC. (Id.). As noted above, WMC had remained as mortgagee on the Policy throughout all transactions, but did not notify MPIUA of the interim transfers.

Subsequently, by letter dated October 21, 2008, MPIUA's counsel replied to Attorney Atlas' September 17 letter. (DF ¶ 33). Therein, MPIUA's counsel stated in part:

> I have your letter of September 17.
>
> On MPIUA's behalf, this office previously requested evidence of [SPS'] status as, or on behalf of, the current mortgagee. Among other reasons, this was requested because MPIUA had no record or notice of SPS as mortgagee or as the mortgagee's servicing agent. You have responded with computer-generated copies of notices sent to the insured (John Brohl) advising him of new servicing agents, including Ocwen Loan Servicing LLC and SPS.
>
> In our view, copies of these notices are not evidence of SPS's status on behalf of the mortgagee. We request copies of the agreements assigning the mortgage from WMC Mortgage Corp. (the initial mortgagee) to any successor(s), through to the present. We also request the copies of the agreement or agreements between the mortgagee at any given time and the servicing agent, giving the agent authority to act on behalf of the mortgagee. This would include (without limitation) your client's agreement to act on behalf of the current mortgagee.

(DF ¶ 33). MPIUA raised no objection to the fact that neither SPS nor Credit Suisse was listed on the Mortgage.

It is undisputed that neither SPS nor its counsel provided any of the information or documentation requested in the October 21, 2008 letter, which was sent after WMC had repurchased the loan. (DF ¶ 34). Similarly, there is no evidence that MPIUA was notified of the transfer to WMC. Instead, on March 23, 2009, WMC brought this action against MPIUA claiming that the defendant breached its contractual obligations under the Policy by failing to pay WMC's mortgagee claim (Count I), breached the implied covenant of good faith and fair dealing by failing to pay WMC's mortgagee claim (Count II), and engaged in unfair settlement practices by "failing to promptly investigate and resolve a claim;" "refusing to pay an undisputed claim;" and "intentionally engaging in a scheme designed to avoid payment of claims by denying claims without any justification or right and forcing claimants to file a lawsuit to collect money due under the policy" (Count III). (DF ¶ 35; Complaint at Counts I-III).

WMC's Production of Documents to MPIUA

Following the initiation of this lawsuit, MPIUA's counsel continued to request evidence of WMC's status as the mortgagee with respect to the Property. (DF ¶ 36; PF ¶ 23). On September 22, 2009, WMC produced to the defendant a copy of a document entitled "Assignment of Mortgage," which reflects the transfer of the "right, title and beneficial interest in" the Mortgage from MERS, "as nominee for WMC Mortgage Corporation," to WMC on that date. (DF ¶ 37; Def. Ex. M). Subsequently, WMC provided MPIUA with funding schedules and wire transfers establishing WMC's

repurchase of the Brohl loan from UBS and from Credit Suisse, as well as with a copy of the Note endorsed in blank. (See PF ¶ 23; DR ¶ 23). MPIUA agrees that WMC now has provided sufficient proof to establish that it is currently the mortgagee. (See Def. Opp. Mem. (Docket No. 28) at 2, 4). However, MPIUA has not paid any insurance proceeds to WMC for water and fire losses at the Property. (PF ¶ 24).

Additional factual details relevant to this court's analysis are described below.

III. ANALYSIS

A. Summary Judgment Standard of Review

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). "A dispute is 'genuine' if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party." Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996) (quotations and citations omitted). A material fact is one which has "the potential to affect the outcome of the suit under the applicable law." Id. (quotations and citations omitted). In order to defeat the entry of summary judgment, the nonmoving party must submit "sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of the truth at trial." LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993) (internal citations and quotations omitted), cert. denied, 511 U.S. 1018, 114 S. Ct. 1398, 128 L. Ed. 2d 72 (1994). However, the court will not consider "conclusory allegations,

improbable inferences, and unsupported speculation." Galloza v. Foy, 389 F.3d 26, 28 (1st Cir. 2004) (quotations and citation omitted).

"Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Group, Inc. v. Ferré Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001). "When facing cross-motions for summary judgment, a court must rule on each motion independently, deciding in each instance whether the moving party has met its burden under Rule 56." Dan Barclay, Inc. v. Stewart & Stevenson Servs., Inc., 761 F. Supp. 194, 197-98 (D. Mass. 1991).

B. Alleged Failure to Provide "Satisfactory Proof" of Mortgagee Status Pursuant to Mass. Gen. Laws. ch. 175, § 97

MPIUA argues that it is entitled to summary judgment on WMC's claims because prior to filing suit, the plaintiff and its predecessors failed to provide "satisfactory proof" of their "right and title" as mortgagees under the Policy, as required to warrant coverage under Mass. Gen. Laws ch. 175, § 97. (Def. Mem. (Docket No. 14) at 8-10). It is undisputed that a claim was originally made on June 12, 2007 by Ocwen, and that Ocwen was appropriately listed as the mortgagee on the Property at that time. Therefore, Ocwen made a legitimate claim under the Policy. However, it is also undisputed that MPIUA was unable to complete its analysis of Ocwen's claim before the loan and the servicing rights had been transferred, and WMC does not contend that MPIUA's failure to pay Ocwen at that time was inappropriate. Accordingly, the issue is whether SPS or WMC provided the proof necessary to trigger MPIUA's obligation to provide coverage pursuant to Mass. Gen. Laws ch. 175, § 97.

The undisputed facts establish that it was not until after this lawsuit was filed that WMC provided MPIUA with the proof necessary to confirm its status as a mortgagee with respect to the Property. Therefore, to the extent WMC is claiming that MPIUA failed to act in good faith when it refused to provide coverage without further confirmation of mortgagee status, WMC cannot prevail and MPIUA is entitled to summary judgment. However, to the extent MPIUA is seeking to avoid coverage altogether pursuant to Mass. Gen. Laws ch. 175, § 97, the record does not support such a

result.

The Applicable Statute

Mass. Gen. Laws ch. 175, § 97 provides in relevant part as follows:

> If, by the terms of a fire insurance policy insuring a mortgagor, the whole or any part of the loss thereon is payable to mortgagees of the property, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms, pay all mortgagees protected by such policy in the order of their priority of claim as their claim shall appear, not beyond the amount for which the company is liable, and such payment shall be to the extent thereof payment and satisfaction of the liability of the company under such policy.

(emphasis added). Under the terms of the Policy at issue in this case, coverage is available to mortgagees that are "named in this policy." (See PF ¶ 2; DF ¶ 5 ("If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear")). Thus, pursuant Mass. Gen. Laws ch. 175, § 97 and the applicable Policy, the insurer's obligation to provide mortgagee coverage arises only upon "satisfactory proof" of a party's "rights and title" as a mortgagee named in the Policy.[6]

[6] The plaintiff argues that because MPIUA issued a check made payable to Popkin Adjustment Co., Ocwen and WMC on June 8, 2007, "MPIUA cannot now claim that WMC was not named in the Policy or that it had insufficient proof to conclude that WMC was, in fact, a mortgagee." (Pl. Mem. at 11-12). This court disagrees that MPIUA's issuance of the check resulted in a waiver of any of its defenses in this action. As WMC has admitted, the circumstances surrounding the issuance of the check remain unknown, and there is nothing in the record indicating why the check was issued or whether it was ever sent. (Pl. Mem. at 4 n.6). Furthermore, it is undisputed that prior to the issuance of the check, the Mortgage was assigned to UBS. (See DF ¶ 8; PR ¶ 8; Def.

Proof of Mortgagee Status

The record demonstrates that on June 12, 2007, Ocwen submitted a claim to MPIUA for mortgagee coverage under the Policy. (Def. Ex. A at Exhibit B). Ocwen was named as a mortgagee under the Policy at that time, (see PF ¶ 4), and there was never any demand for confirmation of Ocwen's status. Therefore, based on the record before this court, Ocwen would have been entitled to payment pursuant to Mass. Gen. Laws ch. 175, § 97 if MPIUA had completed its investigation at that time. Nevertheless, it is undisputed that prior to the completion of MPIUA's investigation into Ocwen's claim, WMC repurchased the Note and the servicing rights on the loan were transferred from Ocwen to Litton. (See PF ¶ 13). Moreover, WMC does not contend that MPIUA's failure to pay Ocwen was unreasonable or improper under the circumstances. Thus, the issue is the sufficiency of proof of the subsequent mortgage holders.

A second claim for mortgagee coverage was submitted to MPIUA by SPS on about June 19, 2008. (Def. Ex. H. at 2). The plaintiff contends that the documents that SPS submitted to the defendant in connection with that claim were sufficient to prove that SPS and/or Credit Suisse were entitled to coverage as mortgagees under the Policy and, therefore, WMC is entitled to summary judgment. (See Pl. Mem. at 7-8). WMC's argument must fail for several reasons. As an initial matter, it is undisputed that neither

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Ex. C). Thus, the fact that MPIUA issued such a check made payable to WMC does not establish that WMC was a mortgagee with a valid claim for coverage and does not preclude MPIUA from pursuing its defenses.

SPS nor Credit Suisse was named as a mortgagee under the Policy, and that MPIUA had no notice regarding either of those parties' status as a mortgagee. (See DF ¶¶ 22-24; PR ¶ 23). Accordingly, WMC cannot show that its predecessor was entitled to coverage as "mortgagees protected by [the] policy." Mass. Gen. Laws ch. 175, § 97. Nevertheless, MPIUA never raised this as a reason for rejecting SPS's claim, but rather only requested additional information proving SPS's status as mortgagee, even after informing SPS that MPIUA had never received notice of the assignment. (See DF ¶ 33). Thus, whether MPIUA could rely on the lack of notice in rejecting the claim remains an open question, which has not been fully briefed by the parties.

Moreover, it was reasonable for MPIUA to request additional information. Nothing in the documents that SPS submitted to MPIUA along with its claim or in its response to MPIUA's request for documentation established that SPS or Credit Suisse had any beneficial interest, right or title in the mortgage. Significantly, SPS provided no records reflecting any assignments of the mortgage, or otherwise establishing the chain of title from WMC/Litton to itself or Credit Suisse.[7] See In re Samuels, 415 B.R. 8, 20 (Bankr. D. Mass. 2009) (bank could not establish ownership of mortgage with standing to enforce it where it was unable to produce complete chain of written assignments transferring title); Warden v. Adams, 15 Mass. 233, 236 (1818) ("By force of our statutes regulating the transfer of real estates and for preventing frauds, no interest passes by a

[7] Even the Note produced by SPS was made payable to WMC and contained no other endorsement. (See Def. Ex. H at Adjustable Rate Note).

mere delivery of a mortgage deed, without an assignment in writing and by deed."). The fact that SPS was able to produce copies of documents relating to the loan and notices to Brohl regarding changes in servicing agents did not constitute proof of SPS' or Credit Suisse's ownership of the Mortgage.

Relying on Cullen Enters., Inc. v. Mass. Prop. Ins. Underwriting Assoc., 399 Mass. 886, 507 N.E. 2d 717 (1987), WMC argues that the documents its predecessor provided, and in particular the Validation of Debt Notice notifying Brohl that SPS would be collecting the debt "on behalf of Credit Suisse, the investor who currently owns your mortgage loan," were sufficient to establish its rights as mortgagee under the Policy. (Pl. Mem. at 7-8). However, Cullen does not support WMC's position. In that case, the plaintiff established that he had provided the insurance adjuster with all of the information requested in order to substantiate his interest in the mortgage and support his claim for mortgagee coverage under a fire insurance policy issued by the defendant. Cullen, 399 Mass. at 891-92, 507 N.E. 2d at 720. Thus, the burden of proof shifted to the insurer to provide evidentiary support for its position that the plaintiff had not in fact provided sufficient information to support his claim. Id. at 892, 507 N.E. 2d at 720. The insurer was unable to present any such evidence. In particular, it failed to "file an affidavit establishing what further information it wanted and could not obtain beyond that already provided by the plaintiff." Id. at 892, 507 N.E. 2d at 720-21. Accordingly, the court concluded that the plaintiff was entitled to partial summary judgment on his claim for coverage under the policy. See id. at 892-93, 507 N.E. at 721.

In contrast to Cullen, the record presented on summary judgment in this case establishes that SPS did not provide all the information that MPIUA requested, and that MPIUA was not satisfied with the information SPS did provide. Notably, in a letter dated October 21, 2008, MPIUA's counsel confirmed his earlier request for evidence of SPS' status as or on behalf of the mortgagee, and he specifically requested "copies of the agreements assigning the mortgage from WMC Mortgage Corp. (the initial mortgagee) to any successor(s), through to the present" as well as documentation establishing SPS' authority to act on behalf of the mortgagee. (DF ¶ 33). A good faith, reasonable position by an insurer, even if incorrect, does not constitute an unfair settlement practice. Romano v. Arbella Mut. Ins. Co., 429 F. Supp. 2d 202, 207 (D. Mass. 2006). Similarly, a party does not breach an implied covenant of good faith and fair dealing if it does not engage in "conduct taken in bad faith." Christensen v. Kingston Sch. Comm., 360 F. Supp. 2d 212, 226 (D. Mass. 2005). Given the fact that neither SPS nor Credit Suisse was named as a mortgagee in the Policy, that MPIUA had received a claim for mortgagee coverage from an unrelated entity and had no prior notice of SPS' or Credit Suisse's interest in the Brohl Mortgage, and that UBS was named in public filings as the mortgagee with respect to the Property at the time SPS submitted its claim for coverage, the defendant's refusal to accept the Validation of Debt Notice or other information provided as proof of Credit Suisse's interest and its request for further documentation was reasonable.

SPS failed to provide any of the requested information. (DF ¶ 34). Instead,

shortly after SPS responded to MPIUA's initial request for information, WMC repurchased the loan from Credit Suisse. (See PF ¶ 21). Neither SPS nor WMC notified the defendant that the loan had been transferred, and WMC never attempted to provide any additional information before filing suit. Therefore, there would have been no basis for the defendant to have paid WMC. Under such circumstances, MPIUA is entitled to summary judgment with respect to Counts II and III of the Complaint. However, for the reasons that follow, MPIUA has not established that Mass. Gen. Laws ch. 175, § 97 relieves it from the obligation to provide coverage to WMC.

WMC's Current Interest in the Mortgage

It is undisputed that since the commencement of the instant action, WMC has submitted sufficient evidence to establish its status as the current owner of the Brohl Mortgage. (See Def. Opp. Mem. at 2, 4).[8] It is also undisputed that WMC is named as a mortgagee under the Policy. (See PF ¶ 4).[9] Therefore, WMC has provided "satisfactory proof" of its "rights and title" as a mortgagee named in the Policy, thereby triggering MPIUA's duty to provide mortgagee coverage under Mass. Gen. Laws ch. 175, § 97.

MPIUA argues, without elaboration, that WMC lacks standing to pursue its claim

[8] In light of this admission, this court will not address whether the Note WMC produced, which was endorsed in blank, constituted "satisfactory proof" of the holder's "right and title" to the mortgage. (See Pl. Mem. at 6; Def. Opp. Mem. at 3-4).

[9] MPIUA does not address whether any of the transfers in any way altered WMC's mortgage interest so as to render WMC's identification as a mortgagee in the Policy invalid. Therefore, this court assumes that the initial identification of WMC in the Policy satisfies the Policy requirement that the mortgagee be named in the Policy.

for coverage because MPIUA never declined a claim by WMC. (Def. Mem. (Docket No. 14) at 9). However, MPIUA does not challenge the proposition that as a result of the assignment of the mortgage back to WMC, the plaintiff succeeded to all of the rights of its predecessor mortgagees. See Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1238 (1st Cir. 1996) ("it is hornbook law that the assignee of a mortgage succeeds to all of the assignor's rights power and equities"); Money Store/Mass., Inc. v. Hingham Mut. Fire Ins. Co., 430 Mass. 298, 301, 718 N.E.2d 840, 842 (1999) (as a result of assignment from prior mortgagee, assignee succeeded to all rights held by prior mortgagee to enforce its debt against the property under the terms of the mortgage). Thus, the record supports the conclusion that WMC is entitled to pursue the claims that were made by its predecessors, Ocwen and SPS/Credit Suisse, for coverage under the Policy. Accordingly, MPIUA has not shown that the statute forecloses WMC's right to coverage.

C. Alleged Failure to Cooperate with MPIUA's Investigation

MPIUA nevertheless argues that the failure of WMC and its predecessor to comply with the insurer's request for confirmation of mortgagee status during the course of its investigation into the mortgagee claims constituted a breach of their duty of cooperation under the Policy and voided any coverage.[10] (Def. Mem. at 11). WMC does

[10] WMC argues that MPIUA waived its defense of failure to cooperate "when it requested information evidencing WMC's status as mortgagee after the litigation was commenced." (Pl. Mem. at 11). MPIUA made no such waiver. The defendant specifically asserted this defense in its Second Affirmative Defense set forth in its

not dispute that the Policy required it and its predecessor to cooperate with the insurer by complying with MPIUA's reasonable request for documents. However, it contends that assuming, arguendo, these entities failed to provide adequate evidence to support their claims under the Policy, the failure did not relieve the defendant of its obligation to provide coverage because MPIUA suffered no prejudice. (Pl. Mem. at 8-10). As detailed below, this court finds that the failure of WMC and its predecessor to submit documents substantiating their mortgagee status amounted to a breach of the duty to cooperate, and that MPIUA was prejudiced as a result. However, this court further concludes that any prejudice to the defendant may be remedied by an order directing the plaintiff to pay MPIUA all of its attorneys' fees and costs incurred in connection with this litigation, and that MPIUA should not be excused from coverage.

Breach of Duty to Cooperate

The conditions contained in the Policy require an insured to "provide [MPIUA] with records and documents we request" "as often as we reasonably require." (Def. Ex. A at Agreement p. 6). The parties agree that this provision is applicable to mortgagees. Thus, under the Policy, WMC and its predecessor had a duty to cooperate with MPIUA's investigation by providing documents responsive to MPIUA's reasonable request for information substantiating their mortgagee claims. See Miles v. Great N. Ins. Co., 671 F.

Answer, Affirmative Defenses, and Demand for Jury Trial (Docket No. 6). Moreover, discovery of evidence pertaining to WMC's status as a mortgagee is relevant to the issues raised in this action, and MPIUA was entitled to pursue such discovery without forfeiting its legal defense.

Supp. 2d 231, 238 (D. Mass. 2009) ("When an insurer investigates a loss claim, the insured has a duty to cooperate by submitting to an examination under oath and producing documents relevant to the claimed loss"). Moreover, the requirement that the insured supply relevant documents is a "condition[] precedent to coverage under the Policy." Id. See also Rymsha v. Trust Ins. Co., 51 Mass. App. Ct. 414, 417, 746 N.E. 2d 561, 563 (2001) (construing duty to produce relevant documents as a condition precedent to insurer's liability). As detailed above, the record shows that WMC and its predecessor, SPS, failed to produce the documents requested by MPIUA in order verify their mortgagee status prior to the commencement of this lawsuit. (See DF ¶¶ 33-34). Accordingly, the record establishes that there was a breach of the duty to cooperate. See Hanover Ins. Co. v. Cape Cod Custom Home Theater, Inc., 72 Mass. App. Ct. 331, 336, 891 N.E. 2d 703, 707 (2008) (refusal to turn over relevant documents until prompted by lawsuit constituted breach of duty to cooperate).

Prejudice

"Ordinarily, an insured's failure to cooperate is grounds for denial of coverage only if the insurer makes an 'affirmative showing of actual prejudice' resulting from the failure." Miles, 671 F. Supp. 2d at 239 (quoting Romano v. Arbella Mut. Ins. Co., 429 F. Supp. 2d 202, 208 (D. Mass. 2006)). See also Hanover Ins. Co., 72 Mass. App. Ct. at 336, 891 N.E. 2d at 707 ("Recently, we had occasion to observe that, as a general rule, an insurer may not disclaim coverage by virtue of an insured's breach of its duty to cooperate absent a showing of prejudice"). Massachusetts courts "'have recognized a

limited exception to the prejudice requirement in those cases where there was a wilful and unexcused refusal of the insured to comply with an insurer's timely request for an examination under oath.'" Hanover Ins Co., 72 Mass. App. Ct. at 336, 891 N.E. 2d at 707 (quoting Boffoli v. Premier Ins. Co., 71 Mass. App. Ct. 212, 216, 880 N.E. 2d 826, 829 (2008)). No such circumstances are presented in this case. Compare id. at 336-37, 891 N.E. 2d at 707-08 (where insured "did not simply commit a breach of its duty to cooperate by its persistent and unjustified refusal to turn over relevant documents," but also refused to comply with insurer's reasonable request for examination under oath, insurer did not need to show prejudice to be relieved of obligation to provide coverage). Therefore, MPIUA must show prejudice in order to avoid coverage as a result of the failure to cooperate.

MPIUA has shown that under the circumstances presented in this case, it was prejudiced by the failure to cooperate. WMC brought suit without even attempting to provide documentation of its status as mortgagee. Therefore, MPIUA was put in the position of having to pay a claim to a potentially improper party or defend a lawsuit for breach of contract and unfair settlement practices. See Rymsha, 51 Mass. App. Ct. at 418, 746 N.E. 2d at 564 (finding prejudice to insurer "too obvious to warrant discussion" where insured's "refusal to furnish the reasonably requested pertinent information put [insurer] in the untenable position of either paying the claim without question and without any means by which to investigate its validity . . . or being sued for breach of contract and unfair acts and practices"). As the record demonstrates, ownership of the Mortgage

was a moving target and MPIUA had no means of verifying the identity of the mortgagee without information from the claimants. Thus, by withholding information essential to MPIUA's determination as to the validity of the claim, and then suing the insurer when coverage was not forthcoming, WMC and its predecessor prejudiced the defendant. See Miles, 671 F. Supp. 2d at 240 (concluding that insured "prejudiced [insurer] by withholding information 'essential to [insurer's] sound coverage and defense decisions'") (quoting Metlife Auto & Home v. Cunningham, 59 Mass. App. Ct. 583, 591-92, 797 N.E. 2d 18, 24 (2003)).

Plaintiff's Right to Cure

Notwithstanding the failure to cooperate and resulting prejudice to the defendant, this court finds that WMC should not be barred from recovering insurance proceeds under the Policy. As an initial matter, the first claim for coverage made by Ocwen was made by a mortgagee named in the Policy which held the same Mortgage as is presently held by WMC. Thus, there is no question that MPIUA has been on notice since at least June 12, 2007 that it would have obligations to a mortgagee. It is simply the identity of the correct mortgagee that has been at issue. Thus, MPIUA would not be prejudiced if WMC is given the right to cure under the facts presented here.

Moreover, it is undisputed that during the course of discovery in this action, WMC produced the documents necessary to confirm its status as the current mortgagee and to show that it is a proper claimant under the Policy. "[T]here is no controlling Massachusetts caselaw (sic) indicating whether an insured who has breached a duty of

cooperation can later cure that breach and thereby obtain the proceeds of his or her insurance policy." Miles v. Great N. Ins. Co., 656 F. Supp. 2d 218, 223 (D. Mass. 2009).[11] However, there are cases where courts have allowed insureds an opportunity to cure such a breach, at least where the failure to cooperate was not willful. See, e.g., Romano, 429 F. Supp. 2d at 208 (although insureds did not produce documents until ordered to do so by court, and thereby failed to cooperate as required by policy, since the insurer "now has the information necessary to make an actual assessment of the [plaintiff's] coverage claim" insurer's motion for summary judgment on breach of contract claim denied); Thomson v. State Farm Ins. Co., 232 Mich. App. 38, 45, 592 N.W. 2d 82, 85 (1998) (where insured's failure to cooperate is not willful, dismissal of action for coverage under policy "is to be without prejudice"); Marmorato v. Allstate Ins. Co., 640 N.Y.S. 2d 97, 98, 226 A.D. 2d 156, 156 (1996) (finding that although plaintiff

[11] MPIUA argues that under Rymsha, WMC's production of requested information during the course of litigation cannot cure the earlier failure to cooperate. However, in that case, the Massachusetts Appeals Court refused to recognize a right to cure a breach of the duty to cooperate after the lower court granted summary judgment against the insured and the Appeals Court determined that the insurer's requests for information were reasonable. As the Court stated, "[i]n the circumstances of this case, we do not see why Rymsha should be entitled to a judicial test-run on the issue of the reasonableness of [the insurer's] requests for information where the law provides her with more than adequate remedies for any unreasonable, unfair, or illegal act by [the insurer]." Rymsha, 51 Mass. App. Ct. at 419, 746 N.E. 2d at 564-65. Significantly, Rymsha did not address the situation presented here, where the insured produces the requested information during litigation, but before any ruling has been made on the question whether the insurer's requests were reasonable. Therefore, this court concludes that Rymsha does not foreclose the plaintiff's right to cure under the circumstances of this case.

breached contractual obligation to cooperate with insurer's investigation, "the noncompliance was not so willful or extreme as to warrant dismissal of the action without giving plaintiff one last chance to answer the questions"). In the instant case, there is nothing in the record on summary judgment to suggest that the failure to cooperate was willful. On the contrary, the evidence indicates that attorneys for SPS made attempts to comply with MPIUA's requests for information, and provided a number of documents which, while not conclusive, at least constituted some evidence that Credit Suisse and SPS were entitled to payment as the mortgagees.

The only prejudice to MPIUA was caused by WMC prematurely bringing suit instead of establishing its entitlement to payment as mortgagee. Therefore, any prejudice that MPIUA has suffered can be cured by an order requiring WMC to pay any costs and attorneys' fees incurred by MPIUA as a result of this lawsuit. This would compensate the insurer for having to defend a decision that was reasonable under the circumstances while avoiding the extreme penalty that WMC would suffer if its breach of contract claim were dismissed. Accordingly, this court recommends that WMC be entitled to recover under the Policy subject to an order that WMC pay any costs and attorneys' fees that MPIUA has incurred in connection with this action. See Hanover Ins. Co., 72 Mass. App. Ct. at 333-34, 891 N.E. 2d at 705-06 (where insured failed to submit to examination under oath or to produce documents until insurer brought action for declaratory relief, trial court ordered insured to pay costs and attorneys fees to cure the prejudice caused to

the insurer).[12]

IV. CONCLUSION

For all the reasons detailed herein, this court recommends to the District Judge to whom this case is assigned that both of the parties' motions for summary judgment be ALLOWED IN PART and DENIED IN PART. Specifically, this court recommends that MPIUA's motion for summary judgment be allowed with respect to WMC's claims for breach of the implied covenant of good faith and fair dealing and unfair settlement practices (Counts II and III), but otherwise denied. This court further recommends that WMC's cross-motion for summary judgment be allowed with respect to the breach of contract claim (Count I), subject to an order that WMC pay the defendant for all costs and attorneys' fees incurred in connection with this litigation, and that WMC's motion otherwise be denied.[13]

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[12] This order was reversed on appeal where the Appeals Court held that "[a]n insured's wilful, unexcused refusal to comply with a reasonable request for an examination under oath, as here, constitutes a material breach of a condition precedent to the insurance contract and discharges the insurer's obligations therunder." Hanover Ins. Co., 72 Mass. App. Ct. at 336, 891 N.E. 2d at 707. However, the court left undecided the issue whether the failure to produce documents until after litigation was commenced "standing alone, which itself prejudiced the insurer, could be remedied by requiring the insured to recompense the insurer its costs and attorney's fees, for that is not the situation before us." Id. at 336, 891 N.E. 2d at 707.

[13] The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72 any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify

/ s / Judith Gail Dein
Judith Gail Dein
U.S. Magistrate Judge

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the portion of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this Rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604-05 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also Thomas v. Arn, 474 U.S. 140, 153-54, 106 S. Ct. 466, 474, 88 L. Ed. 2d 435 (1985). Accord Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3-4 (1st Cir. 1999); Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994); Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998).

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